

Getting paid is always a high priority

A simple step can help contractors avoid getting stiffed in construction lien cases

For obvious reasons, our state's courts are flush with construction lien foreclosure lawsuits. In the not-too-distant past, the vast majority of these cases would have been resolved quickly as owners and contractors settled their differences and moved on to their next projects.



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Now, with tight credit markets, in many cases there is simply not enough money to settle before trial. And the lenders – who historically have stepped in before foreclosure – are preoccupied with their own problems.

Under these circumstances, possessing a valid lien can increase a contractor's chances of getting paid. If, however, a mortgage or trust deed has priority, the likelihood of receiving payment from the foreclosure sale decreases significantly and any hope of settling with the lender is lost. Contractors can, in many cases, avoid this frightening scenario by sending all mortgage and trust deed holders – typically, the lenders – a Notice of Right to a Lien when they start a project. The problem is that contractors often fail to take this simple step, and many are now learning this lesson the hard way – by litigating priority issues in their lien foreclosure cases.

What is priority?

Priority is a legal term that refers to the precedence of claims. Construction liens, mortgages and trust deeds all provide security for claims. Just as the construction lien provides security for a contractor's claim for payment, the mortgage or trust deed provides security for repayment of a loan.

If a construction lien claim and a mortgage or trust deed are competing, the one that has priority gets paid first from the proceeds of the foreclosure sale. And in this economic climate, getting paid first can mean the difference between getting paid and holding a worthless breach of contract claim against an insolvent single-purpose LLC whose only asset is the project.

Who has priority?

Under Oregon law, construction liens generally enjoy priority over mortgages and trust deeds. However, this general rule is subject to four important exceptions. The first arises when the construction lien claimant fails to timely send the Notice of Right to a Lien to the mortgage or trust deed holder. The lien claimant in this situation loses priority for the materials portion of the claim but is entitled to priority for the remainder.

The second exception arises when a contractor fails to send a

Contractors can (protect themselves) by sending all mortgage and trust deed holders – typically, the lenders – a Notice of Right to a Lien when they start a project.

Notice of Right to a Lien to the lender and fails to segregate the materials charges from the other charges on the lien claim form. These two errors are compounded because the entire amount of this hapless contractor's lien loses priority to the lender's mortgage or trust deed.

The third exception involves construction liens for site preparation work. If the mortgage or trust deed was recorded before the project started, it will have priority over a lien for such work.

The fourth exception occurs when the construction lien is for alterations or repairs to an existing improvement and the mortgage or trust deed was not given to secure financing for that work but was recorded before the construction work started.

How to maintain priority

To preserve priority for the materials portion of their liens, all contractors, subcontractors and material suppliers should send a Notice of Right to a Lien to lenders and others with recorded interests in the land or improvement. The notice covers any materials furnished in the eight days, not including weekends and certain holidays, before delivery of the notice. In addition, to be effective, the notice must be delivered in person or mailed by registered or certified mail.

For site preparation contractors, unfortunately, the prospects are grim – lenders often are reluctant to voluntarily subordinate their interests to a construction lien. However, "preparation" has a specific meaning under the lien law, and a lawyer should be consulted before the project to determine whether notice should be sent.

Worse still are those renovation contracts for which the mortgage or trust deed was not given to secure financing for the project. The good news is that such contracts are relatively rare, but expect them to increase as many owners turn from new construction to renovating their existing buildings.

The lesson in the recent flood of construction lien foreclosure cases is clear: It is better to send a Notice of Right to a Lien and not need to, than to need to and not send it.

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